

EYEWITNESS IDENTIFICATION: WITNESSES, EXPERTS, AND STRATEGIES

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BASIC SET UP: You have an eyewitness who sees someone commit a crime.

“HOW TO” PREPARE FOR EYEWITNESS IDENTIFICATION EXPERTS

- Pre-identification:
 - You have an eyewitness who sees someone commit a crime. The next step is to have them identify the eyewitness from a show-up, live line-up, or photo line-up.
 - Your Officers/Detectives are coming to you for advice about conducting the identification procedure.
 - Ideal: Consult with your anticipated expert as to how the officers should proceed with the identification procedure (there may be new developments in the field).
 - How do you know who your anticipated expert might be? Ask other prosecutors in the state.
 - Next best: Have your officers comply with procedures set forth in the following publications from the United States Department of Justice and National Institute of Justice: 1) Eyewitness Evidence: a Guide for Law Enforcement (1999); and 2) Eyewitness Evidence: a Training Manual for Law Enforcement (2003).
 - The most common and easiest attack on your eyewitness identification will be that your Officers/Detectives did not follow these guidelines.
 - Most experts in this field will agree that the “NIJ” guidelines provide good methods for conducting various identification procedures. Most consider these procedures as the “best practices” available. As a result, when your Officers/Detectives do not follow these procedures the defense expert will testify that the jurors should give the identification less weight (no weight).
- Have your Officer/Detective video or audio record the procedure.
- Have a “blind” administrator conduct the procedure.

- A “blind” administrator is an Officer/Detective who does not know who the suspect is.
- Most common: Your Officers/Detectives have done the procedure and you have to work with what you have been given.
- Post –identification – Defense Expert
 - Defendant will usually hire an expert to attack the identification. How do you prepare for Defendant’s expert witness?
 - Check their CV for articles and publications they have written and cases in which they have testified.
 - Read the articles, and get transcripts from the cases.
 - Get transcripts from other prosecutors.
 - In your state, the expert’s home state, and from any other trial you can find.
 - Check the expert’s website and google the expert.
 - Call their expert with your investigator present.
 - You may be surprised that they are not taking as strong a position as it appears in your report.
 - Cross Examination
 - In most instances this will be a concession based cross of their expert. The jury does not necessarily need someone to tell them if people can recognize other people. This is not a rare human experience and should not be made out to be any greater of an issue than it really is.
 - Common concessions:
 - The laboratory experiments are not measuring a real – life incidents.
 - There is no way to study a real – life incident.
 - Eyewitnesses can get it right
 - Eyewitnesses have gotten it right
- Subsequent DNA
- Subsequent Confession

- *Be careful here – you may not want to open the door to a discussion of when eyewitnesses have gotten it wrong if it has not come in at that point.*

- Every person is different so that the stress may either inhibit or enhance the witness's ability to memorize and recollect a face. The expert does not know if stress actually helps this witness collect information.
- If their expert wants to point out everything your Officers/Detectives did wrong, consider pointing out everything your Officers/Detectives did correct.
- Finally, the Defense expert may be impeachable
 - Taking different positions in other cases or publications (transcripts and articles).
 - He/She may not have written or studied in the field for a long time (may not be up on current developments).
- Post – identification – State Expert
 - If you decide to hire a rebuttal expert – how do you find them? Ask other prosecutors in your network.
 - Read your expert's CV, publications, articles, etc.
 - Submit to your expert
 - The police reports
 - Interviews
 - Transcripts of hearings or interviews
 - Defense expert's reports and materials (This is where they get really engaged).
 - Talk with your expert
 - Explain your understanding of the science and issues in your case. Do you have a good handle on the science and issues?
 - Discuss your case in a factually specific manner with your expert. Explore your arguments and if they are consistent with your expert's understanding of science regarding eyewitness identification.
 - "Is it possible for _____."
 - "Is there a problem with me arguing the following under the science, tell me why?"

- Ask your expert if there are common human experience examples that illustrate the points they are making.
 - Make it clear to your expert what you are hoping to get the Jury to understand. Remind your expert that the jury probably knows very little about the science, but they know a lot about common human experience.
- Direct
 - Detail factors in favor of a reliable identification.
 - Detail corroborating evidence.
 - Explore common experience scenarios consistent with your points.
 - When someone turns face, you are not surprised, because our brains have a way of calculating and remembering faces.
 - A photo album can jog a memory of an old relative or event.
 - Point out the problems with Defendant's expert's opinion.

REMEMBER, THIS IS NOT A HARD SCIENCE LIKE DNA. THE MORE THAT YOU CAN EXPLAIN WHY YOUR IDENTIFICATION IS CONSISTENT WITH COMMON HUMAN EXPERIENCE, THE BETTER.

MOST THINGS MAKE SENSE WHEN YOU LOOK AT THEM IN THAT LIGHT.